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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 783

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

DEWEY SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, *Appellant,* versus DEWEY SMITH, PETITIONER, *Appellee.*	NO. 1193 HABEAS CORPUS

Appeal from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,
United States Attorney, Atlanta, Ga.
HARVEY H. TYSINGER, ESQ.,
Assistant United States Attorney, Atlanta Ga.,
H. T. NICHOLS, ESQ.,
Assistant United States Attorney, Atlanta, Ga.,
Attorneys for Appellant

CLINT W. HAGER, ESQ.,
621 *Atlanta National Bank Bldg., Atlanta, Ga.,*
Attorney for Appellee

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THE UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Dewey Smith, *Petitioner,* vs. Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, *Respondent.*	No. 1193 HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

Comes now your petitioner and presents this, his petition for writ of habeas corpus, and shows to the Honorable Court the following facts:

That your petitioner is actually imprisoned and restrained of his liberty and detained in the United State Penitentiary, which is located within the jurisdiction of the United States District Court for the Northern District of Georgia, Atlanta Division.

Your petitioner was originally tried and sentenced to the United States Penitentiary on the 10th day of July, 1934, under sentence of two years and pay a fine of $500.00 imposed by the United States District Court at Charleston, W. Va. Subsequently, a detainer was placed for the custody of your petitioner

upon his release at the expiration of his two years sentence by the Federal Authorities at Catlettsburg, Kentucky.

On February 14, 1936, your petitioner was discharged conditionally in custody of the Federal Authorities and returned to Catlettsburg, Kentucky. Thereafter, your petitioner applied for and was released on bond for his appearance in the United States District Court.

On May 26, 1936, your petitioner was sentenced to serve one year and one day on the instant case by the United States District Court at Catlettsburg, and on May 29, 1936, was committed to the United States Penitentiary at Atlanta, Ga.

During the interim between February 14, 1936, and May 26, 1936, your petitioner is purported to have been arrested on a charge of drunkenness and thereby violated his conditional release. The authorities failed to return your petitioner immediately to complete his first sentence as a conditional release violator, but informed him that the "good time" which was revoked would have to be served after the expiration of the latter sentence.

Your petitioner, in the foregoing petition for a writ of habeas corpus, respectfully shows that the revocation of his conditional release on his first sentence should have taken effect prior to trying your petitioner on the latter case, and the fact that the court imposed a sentence on a different case, your petitioner believes that the 144 days good time re-

voked from the first sentence should have been served concurrently with the latter sentence, which expired on March 16, 1937.

Therefore, your petitioner being unable to submit a brief of laws governing such cases, beg this Honorable Court to take cognizance of and protect such rights as he may justly be entitled.

WHEREFORE: Your petitioner prays that a writ of habeas corpus issue directed to the Warden of the United States Penitentiary at Atlanta, Georgia, to bring and have your petitioner before this court at a time to be by this court determined, together with the true cause of his detention, to the end that due inquiry may be had in the premises and that this court may proceed in a summary way to determine the facts in this regard and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as the law and justice may require.

DEWEY SMITH, No. 48628-A,
Petitioner.

COUNTY OF FULTON)
) ss:
STATE OF GEORGIA)

AFFIDAVIT

Personally appeared before me, Dewey Smith, who being duly sworn, deposes and says that he has read the foregoing petition, that he knows the true contents thereof, and that the allegations therein con-

tained are true, except as to such matters as are stated upon information and belief, and these he verily believes to be true, and that he believes he is entitled to the redress sought therein.

DEWEY SMITH,
Petitioner.

Sworn to and subscribed before me this 16th day of March, 1937.

M. E. ALEXANDER,
Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

AFFIDAVIT IN FORMA PAUPERIS

Petitioner being duly sworn, deposes and says that he is a citizen of the United States, of legal age, and that at present he is imprisoned and detained in the United States Penitentiary at Atlanta, Georgia, and within the jurisdiction of this Honorable Court; that he wishes to bring an action in this Honorable Court to test the legality of his said imprisonment and detention; but that because of his poverty he is unable to pay the costs of the said action or to give security for same, and that he believes he is entitled to the redress he seeks therein.

WHEREFORE: Petitioner respectfully prays that this Honorable Court grant him permission to file and prosecute the said action without cost.

DEWEY SMITH,
Affiant.

Sworn to and subscribed before me this 16th day of March, 1937.

M. E. ALEXANDER,
Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

ORDER GRANTING WRIT IN FORMA PAUPERIS

Read and considered. Let the writ issue as prayed, in forma pauperis, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m. on the 3rd day of April, 1937.

This the 1st day of April, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed in Clerk's Office
U. S. District Court,
Northern District of
Georgia, April 1st, 1937,

J. D. STEWARD, *Clerk,*
By C. B. MEADOWS, *Deputy Clerk.*

(TITLE OMITTED.)

ANSWER

Now comes the respondent in the above-entitled proceeding, and in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein, and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a warrant of commitment issued by the District Court of the United States for the

Southern District of West Virginia. Respondent further says that the facts are, as follows:

Respondent holds in his possession two warrants of commitment directing the incarceration of petitioner. The first sentence was rendered by the U. S. District Court for the Southern District of West Virginia, and commands imprisonment for the term of two years. This sentence with allowance for good conduct expired on February 14, 1936, and petitioner was conditionally released from the institution. He was returned to the institution on May 29, 1936, under a warrant of commitment issued by the U. S. District Court for the Eastern District of Kentucky, directing imprisonment for one year and one day. It appears that on March 26, 1936, a parole warrant was issued for the retaking of petitioner as a conditional release violator under the first sentence of two years. This warrant was transmitted to the predecessor in letter dated June 29, 1936, directing that warrant be placed as a detainer, and that petitioner be taken into custody on the warrant at the expiration of the second sentence of one year and one day which he was then serving. The letter further instructed that the case shoud be listed for a hearing on the violation charge only after the prisoner is in custody on the warrant. These instructions have been strictly complied with in petitioner's case.

On March 17, 1937, the second sentence of one year and one day expired, and petitioner was then taken into custody to serve the remainder of his first sentence, which amounted to 117 days if his conditional release be revoked.

Respondent does not, of course, maintain that there

are any directions in either sentence as to sequence of service; indeed, it would be impossible for the first sentence to provide for service after the second sentence which was passed nearly two years later.

Respondent attaches hereto and makes a part of this response photostatic copies of mittimus of U. S. District Court for Eastern District of Kentucky, of parole warrant signed by Charles Whelan, Member of the U. S Board of Parole, of the return thereof. and of letter dated June 29 1936, signed by Ray L. Huff, Parole Executive, addressed to Mr. A. C. Aderhold, Warden, U. S. Penitentiary, Atlanta, Ga., said exhibits being marked "A", "B", "C", and "D" respectively. Respondent also attaches hereto and makes a part of this response copy of conduct record sheet for the convenience of the court, which tabulates the computation of petitioner's terms of imprisonment, same being marked "D".

Wherefore, having fully answered, respondent prays the judgment of the court.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney
Counsel for Respondent.

EXHIBIT "A"—COMMITMENT

IN THE DISTRICT COURT OF THE
UNITED STATES OF AMERICA
FOR THE
EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG DIVISION

The President of the United States of America—

To the Marshal of the United States for the Eastern District of Kentucky and to the Warden of the U. S. Penitentiary at Atlanta, Ga., GREETING:

Whereas, at the May term of said Court, 1936, held at Catlettsburg, Ky. in said district and division, to wit, on May 27th, 1936, Dewey Smith was sentenced by said Court, upon his conviction to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a (Penitentiary) for and during the term and period of ONE YEAR AND ONE DAY—Hard Labor beginning on the date on which he is received at the Boyd Co. Jail for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentenced is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; for violation of T. 2 Sec. 201 L. T. A.—(Transport untaxed liquor)

And Whereas, the Attorney General of the United States has designated the U. S. Penitentiary at At-

lanta, Ga., as the place of confinement where the sentence of said Dewey Smith shall be served;

Now, this is to command you, the said Marshal, forthwith to take said Dewey Smith and him safely transport to said U. S. Penitentiary and him there deliver to said Warden of said U. S. Penitenciary with a copy of this writ; and you, the said Warden, to receive said Dewey Smith and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable H. Church Ford, Judge of said Court, and the seal thereof, affixed at Catlettsburg, in said district, this 27th day of May, 1936.

A. B. ROUSE,
Clerk.

(L. S.)

AUGUSTA Z. ROGERS,
Deputy Clerk.

RETURN

I have executed the within writ in the manner following, to wit: On May 27, 1936, I delivered said Dewey Smith to the Jailor of the Boyd Co. Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on May 29, 1936, I delivered said Dewey Smith to the Warden of

U. S. Penitentiary at Atlanta, Ga., together with a copy of this commitment.

J. M. MOORE,
United States Marshal,

By W. F. NEALE,
Deputy.

EXHIBIT "B"

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

For Retaking Prisoners Released under Authority Pub. 210, 72d Congress

THE UNITED STATES BOARD OF PAROLE
To any Federal Officer Authorized to Serve Criminal Process Within the United States:

WHEREAS, Dewey Smith, No. 44678-A was sentenced by the United States District Court for the Southern District of West Virginia to serve a sentence of two years ——— months, and ——— days for the crime of violating the Internal Revenue Act and was on the 14th day of February, 1936, released conditionally from the U. S. Penitentiary, Atlanta, Georgia.

AND, WHEREAS, satisfactory evidence has been presented to the undersigned Member of this Board

that said prisoner named in this warrant has violated the condition of his release and is therefore deemed to be a fugitive from justice:

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Dewey Smith, wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this 26th day of March, 1936.

CHARLES WHELAN,
Member U. S. Board of Parole.

When apprehended communicate with Director, Bureau of Prisons for instructions.

EXHIBIT "C"

U. S. Penitentiary,
Atlanta, Ga.
March 17, 1937.

The within named, Dewey Smith, as Register No. 44678-A, was released on conditional release from this institution on February 14, 1936, until the expiration of his maximum term July 5, 1936. He was again committed to this institution on May 29, 1936, under sentence of 1 year and 1 day imposed May 27, 1936, which expired March 16, 1937, and he was retained in custody as a conditional release violator, to serve the

remainder of the first sentence, amounting to 177 days.

FRED G. ZERBST, *Warden,*
By:
Record Clerk.

EXHIBIT "D"—LETTER, HUFF, PAROLE EXECUTIVE, JUNE 29, 1936.

DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
WASHINGTON

June 29, 1936.

Mr. A. C. Aderhold,
Warden, U. S. Penitentiary,
Atlanta, Ga.

In re: Dewey Smith, old No. 44678-A.
new No. 48628-A. ZW

Dear Sir:

Enclosed herewith is copy of referral for consideration of alleged violation and violator warrant in duplicate for the above-named man who is now serving a new sentence in your institution.

Please place the warrant as a detainer and take Smith into custody on the warrant at the expiration of his present sentence. The case should be listed for

a hearing on the violation charge only after the prisoner is in custody on the warrant.

When you have executed the warrant please return the original to this office, stating specifically that you are holding the prisoner as a violator and on the original commitment.

Very truly yours,

RAY L. HUFF
Parole Executive.

EXHIBIT "E"—CONDUCT RECORD

UNITED STATES PENITENTIARY
ATLANTA, GEORGIA.

Record of DEWEY SMITH Color White No. 48628 Alias *Dewey Robert Smith* Crime Vio. Int. Rev. Laws. (P&T Liq.) Sentence 1 year 1 day. Fine $None Not Committed Received May 29, 1936 Where convicted E-Ky-Catlettsburg Sentenced May 27, 1936 Occupation Laborer Age 32 Sentence commences May 27, 1936 Full term expires May 27, 1937 Good time allowance 72 days. Short term expires Mar. 16, 1937 Residence Charleston, W. Va. Action of Parole Board: Sept. 14, 1936 "DID NOT FILE". Eligible for parole Sep. 27, 1936. WANTED: The Par. Board instructed on 6-29-36, that, after exp. inst. sent. subject as cond. rel. Vio. as No. 44678, is to be held in custody under warrant issued 3-26-36; return to be on warrant & same forwarded to

Board; revocation to be had at meeting of Board after exp. of inst. sentence.

ADMITS: 7-21-34, USP. Atlanta, Ga. same name No. 44678, Consp. (Liq. Laws) 2 Years. Disch. 2-16-36. Cond. Release. 3-16-37: Sentence expired as No. 48628. 3-17-37: In custody to serve remainder of 1st. sentence as Reg. No. 44678, has 177 days to serve if CR. Revoked, Exp. 9-9-37.

Filed April 24th, 1937.

(TITLE OMITTED.)

ORDER SUSTAINING WRIT AND

DISCHARGING PETITIONER

The above case came on for hearing and was duly heard and considered.

This case involves the same questions as those in the case of *Kidwell v. Zerbst*, No. 1192, Habeas Corpus, this day decided, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and order filed in the case of *Kidwell v. Zerbst*, and upon authority of same:

It is considered, ordered and adjudged that the writ of habeas corpus be and hereby is sustained, and that respondent discharge petitioner from custody at the

expiration of three days from this date, which time is allowed for taking an appeal, if desired.

This the 13th day of Nov. 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed May 13th, 1937.

(TITLE OMITTED.)

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above named respondent, F. G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 13th day of May, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the

Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney.

HARVEY H. TYSINGER,
Assistant U. S. Attorney.

H. T. NICHOLS,
Assistant U. S. Attorney.
Counsel for Respondent.

Filed May 14, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. It is further ordered that pending the determination of this appeal, appellee shall be released on bail in the sum of $100.00, without sureties.

This 14th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 14, 1937.

(TITLE OMITTED.)

ASSIGNMENT OF ERRORS

And now on this 14th day of May, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 13th day of May, 1937, is erroneous:

(1). Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2). Because the court erred in not ruling that the Parole Board's action was independent of the trial court's jurisdiction of the parolee in the sentence imposed in the second case.

(3). Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4). Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Parole Board's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5). Because the court erred in failing to recognize that it was the legislative intent to vest the Board of

Parole with authority to prescribe the punishment for violation of parole.

(6). Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense, afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the first or parole sentence.

(7). Because under the undisputed facts as set forth in the petition for habeas corpus and in the return of the respondent, the court erred in sustaining the writ of habeas corpus and in ordering the petitioner discharged from custody.

WHEREFORE the respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said writ of habeas corpus and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP,
United States Attorney
HARVEY H. TYSINGER,
Assistant U. S. Attorney.
H. T. NICHOLS,
Assistant U. S. Attorney.
Counsel for Respondent.

Filed May 14, 1937.

(TITLE OMITTED.)

JUDGE'S CERTIFICATE AS TO THE EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the hearing of the above-entitled proceeding, the case was tried upon the basis of the pleadings, consisting of the application for habeas corpus with exhibits attached and the return of the respondent with exhibits annexed, together with the testimony of Ben F. Bates, who testified that he is record clerk of the Atlanta Federal Penitentiary, and otherwise testified to the beginning and expiration dates of petitioner's several sentences substantially as they are set out in the return, and further that the writ of habeas corpus is not premature, but that, if the terms be computed as running concurrently, or as petitioner alleges in his petition they should be, then petitioner woud have been eligible for release from custody on March 17, 1937. Said pleadings and exhibits and said testimony of Ben F. Bates are hereby settled as the evidence in the cause.

This 18th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 18, 1937.

(TITLE OMITTED.)

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for habeas corpus with exhibits attached thereto and order allowing the same.

2. The return of the respondent with exhibits attached thereto.

3. The judgment and order of court of May 13, 1937.

4. Petition for appeal and order of court allowing same.

5. Judge's certificate as to the evidence.

6. The assignment of errors.

7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the

Fifth Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent

Filed May 14, 1937.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA)
) ss:
NORTHERN DISTRICT OF GEORGIA)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 17 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, *Appellant,*

versus

DEWEY SMITH, PETITIONER, *Appellee,*

as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's

office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service thereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 26th day of May, A. D. 1937.

(SEAL)

J. D. STEWARD,
Clerk, United States District Court,
Northern District of Georgia,

By
C. A. McGREW, *Deputy Clerk.*

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

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That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

DEWEY SMITH

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, and Clint W. Hager, Esq., for appellee, was submitted to the Court.

Opinion of the court and dissenting opinion of Sibley, circuit judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same question for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had

expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence..

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934, and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct, and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b), prisoners granted a reduction of sentence for

good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f) in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General, and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. White vs. Kwiatkowski, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. Aderhold vs. McCarthy, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon Anderson vs. Corall, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A., § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723 c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In Anderson vs. Corall, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In Hill vs. Wampler, 298 U. S. 460–465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the

prisoner is returned to custody. Cf. Escoe vs. Zerbst, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, Dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. It he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function; they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole

statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A., § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified, and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result, it seems to me, is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

DEWEY SMITH

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,
United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 24 to 36 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8476, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Dewey Smith is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 23 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of December, A. D. 1937.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1938